

SEP 24 1990

JOSEPH F. SPANIO, JR.
CLERK

(2)
No. 90-353

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOSEPH CAMAIONE, SR.,

Petitioner,

v.

BOROUGH OF LATROBE,

Respondent.

OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

JAMES E. KELLEY, JR.*
GENE E. McDONALD
McDONALD, MOORE, MASON & SNYDER
1005 Courtyard Plaza
P.O. Box 758
Latrobe, Pennsylvania 15650
(412) 539-3511

Counsel for Respondent

**Counsel of Record*

Of Counsel:

MARK L. AUSTRIAN
MARCY M. REMBERGER
COLLIER, SHANNON & SCOTT
3050 K Street, N.W.
Washington, D.C. 20007
(202) 342-8400

QUESTION PRESENTED

Where a state statute is authoritatively construed by the highest court of the state as providing salary supplement benefits solely during the term of active employment, is procedural due process violated when an employee is involuntarily retired according to the provisions of state and local legislation and his temporary salary supplement benefits terminated?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
A. The Issue in This Case Involves the Construction of State Statutes; No Federal Question Is Presented	5
B. An Alleged Conflict Between Decisions of the Pennsylvania Supreme Court Is Not a Proper Basis for United States Supreme Court Review	6
C. No Federal Question Is Raised by a Petitioner's Belief That a Legislative Determination Was Unfair	7
CONCLUSION	9
Appendix A (Opinion of the Supreme Court of Pennsylvania)	1a
Appendix B (Joint Stipulations of Fact)	8a

TABLE OF AUTHORITIES

Cases	Page
<i>Bishop v. Wood</i> , 426 U.S. 341 (1976)	6,8
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972)	5
<i>Callahan v. Pennsylvania State Police</i> , 494 Pa. 461, 431 A.2d 946 (1981)	6
<i>Camaione v. Borough of Latrobe</i> , 523 Pa. 363, 567 A.2d 638 (1989)	4,6
<i>Camaione v. Borough of Latrobe</i> , 113 Pa. Commw. 113, 536 A.2d 500 (Commw. Ct. 1988)	4
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985)	5,8
Statutes	
42 Pa. Cons. Stat. Ann. § 5571(b) (Purdon 1981)	3
53 Pa. Cons. Stat. Ann. § 637 (Purdon Supp. 1990)	2,6
53 Pa. Cons. Stat. Ann. § 46190 (Purdon Supp. 1990)	2,6



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-353

JOSEPH CAMAIONE, SR.

Petitioner,

v.

BOROUGH OF LATROBE,

Respondent.

**OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA**

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 567 A.2d 638 (1989). The copy of that opinion printed in Appendix A of Petitioner's brief is incomplete because it does not include parts of pages 640 and 641. A complete copy of the opinion is reprinted in Appendix A to this brief.

STATEMENT OF THE CASE

Petitioner Joseph Camaione was a police officer employed by Respondent, the Borough of Latrobe. On February 25, 1975, Mr. Camaione suffered a work-related injury. From that date until September 1, 1981, Mr. Camaione was paid his full salary pursuant

to a Pennsylvania statute known as the Heart and Lung Act,¹ which provides a salary supplement for policemen who are temporarily incapacitated.

On July 27, 1981, in compliance with a procedure mandated by a Pennsylvania statute, the Borough of Latrobe enacted a resolution retiring Mr. Camaione and one other police officer from the police force. The state statute authorizes boroughs to reduce the size of the police force for reasons of economy, provided that the employees selected for retirement are eligible for retirement and are selected in order starting with the oldest employee. 53 Pa. Cons. Stat. Ann. § 46190 (Purdon Supp. 1990). Mr. Camaione has stipulated that he was retired "[f]or reasons of economy, and the necessity to reduce projected expenditures in order to balance the budget for the fiscal year ending December 31, 1981" Joint Stipulations of Fact, No. 8 (attached hereto as Appendix B). He also stipulated that he was qualified for retirement and was the oldest employee to be involuntarily retired. *Id.*, No. 11. Finally, he stipulated that the Borough followed all proper statutory procedures in effectuating his retirement. *Id.*, No. 10.

The Borough served notice informing Mr. Camaione of the involuntary retirement proceeding on July 31, 1981 and that the retirement was to become effective

¹ "Any . . . policeman . . . of any . . . borough . . . who is injured in the performance of his duties . . . and by reason thereof is temporarily incapacitated from performing his duties, shall be paid by the . . . municipality, by which he is employed, his full rate of salary, as fixed by ordinance or resolution, until the disability arising therefrom has ceased." 53 Pa. Cons. Stat. Ann. § 637(a) (Purdon Supp. 1990).

September 1, 1981. *Id.*, Nos. 13 and 14. On September 1, 1981 Mr. Camaione's employment was terminated. Mr. Camaione did not appeal with regard to the involuntary retirement proceedings. *See id.*, No. 12; 42 Pa. Cons. Stat. Ann. § 5571(b) (Purdon 1981). Further, Mr. Camaione did not argue below that his termination was improper.

On the effective date of his retirement, the Borough terminated payment of the Heart and Lung Act salary supplement to Mr. Camaione. Thereafter, Mr. Camaione received his monthly pension benefit and his weekly worker's compensation benefit, which together totalled more than the salary supplement he had been receiving pursuant to the Heart and Lung Act. Joint Stipulations of Fact, Nos. 16 and 18. In January, 1983, the Worker's Compensation Board, however, determined that Petitioner's disability was no longer total, and he was awarded a \$25,000 lump sum payment. His weekly worker's compensation check accordingly was terminated.

Mr. Camaione thereafter filed a complaint in *mandamus* seeking the continued payment of the salary supplement under the Heart and Lung Act from September 1, 1981, which he claimed he should receive in addition to his monthly retirement benefit and his worker's compensation benefit. The Court of Common Pleas denied Mr. Camaione's request and dismissed his complaint in *mandamus*, without deciding whether his due process rights were violated.

The Commonwealth Court of Pennsylvania, on appeal, reversed the Court of Common Pleas, holding that due process requires the Borough to provide ad-

vance notice to a retiree of the effect involuntary retirement will have on his Heart and Lung Act salary supplement prior to taking the legislative action to effectuate his involuntary retirement. *Camaione v. Borough of Latrobe*, 113 Pa. Commw. 113, 115, 536 A.2d 500, 502 (Commw. Ct. 1988).

The Pennsylvania Supreme Court reversed the judgment of the Commonwealth Court of Pennsylvania, and reinstated the order of the Court of Common Pleas. *Camaione v. Borough of Latrobe*, 523 Pa. 363, 567 A.2d 638, 641 (1989). The Pennsylvania Supreme Court construed the state statute and held that the Heart and Lung Act does not confer any rights upon injured officers to continue to receive temporary benefits after employment is terminated. *Id.* Moreover, the Act does not remove the right to hire, fire, furlough or retire, which is vested in the Borough by Pennsylvania statute. *Id.* The Pennsylvania Supreme Court reasoned that Mr. Camaione's receipt of temporary benefits under the Heart and Lung Act did not grant him a right to continued membership in the police force. *Id.* Moreover, the Heart and Lung Act did not confer any property rights on Mr. Camaione after he left the police force. *Id.* Because there was no entitlement to Heart and Lung Act benefits under state law, there was no need to provide him with notice that these rights would be extinguished once he was involuntarily retired. *Id.*

REASONS FOR DENYING THE WRIT

A. The Issue in This Case Involves the Construction of State Statutes; No Federal Question Is Presented

The Petition is little more than a tortured attempt to transform a straightforward question of state statutory construction into a Federal due process claim. While Mr. Camaione may be unhappy with the final result of his case and may believe that the Pennsylvania Supreme Court is wrong, that is a matter for the Pennsylvania courts and the Pennsylvania legislature to decide. No Federal concerns are raised by this Petition.

An essential prerequisite to a valid procedural due process claim in the public employment context is a valid property interest or entitlement to the claimed benefit under state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-78 (1972). The resolution of this preliminary question is entirely a matter of state law and statutory construction. "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" *Id.* at 577. The due process protections apply only *after* a state property right has been created. "While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

In this case, the resolution of the entitlement issue depends entirely upon the construction of two Pennsylvania state statutes. The first is the Pennsylvania Borough Code, which authorizes a borough to reduce its police force for reasons of economy. 53 Pa. Cons. Stat. Ann. § 46190 (Purdon Supp. 1990). The second is the Pennsylvania Heart and Lung Act, which provides for continuing compensation during temporary disability for active members of the police force. 53 Pa. Cons. Stat. Ann. § 637 (Purdon Supp. 1990). The Pennsylvania Supreme Court's decision was based on a careful review of the statutes involved. The Pennsylvania Supreme Court held that under state law Mr. Camaione had no lifelong entitlement to Heart and Lung Act benefits once his job with the police force ended. 567 A.2d at 641. Because the Pennsylvania Supreme Court's decision involves solely a question of state statutory construction, the Petition does not even remotely present a question of Federal due process. *See Bishop v. Wood*, 426 U.S. 341, 345-47 (1976). Thus, there is no reason for a writ of certiorari to issue.

B. An Alleged Conflict Between Decisions of the Pennsylvania Supreme Court Is Not a Proper Basis for United States Supreme Court Review

Petitioner next asserts that the decision of the Pennsylvania Supreme Court in this case conflicts with its prior decision in *Callahan v. Pennsylvania State Police*, 494 Pa. 461, 431 A.2d 946 (1981). The two cases were reconciled by the Pennsylvania Supreme Court, involve entirely matters of state statutory construction, and do not require further review. Petitioner raises no argument that either decision of the Pennsylvania Supreme Court conflicts with United States Supreme Court precedent on due

process issues. Again, there is simply no reason for this Court to review a matter of statutory construction under state law.

C. No Federal Question Is Raised by a Petitioner's Belief That a Legislative Determination Was Unfair

Petitioner's argument that termination of his Heart and Lung Act benefits was a violation of some unspecified Federal right because it was done through the "subterfuge" of involuntary retirement does not raise any issues that this Court should decide. The question of whether Mr. Camaione was retired properly is entirely a question of fact. However, no factual issues were disputed below. Mr. Camaione stipulated that his retirement was not a subterfuge. Joint Stipulations of Fact, No. 8. Mr. Camaione stipulated he was eligible for retirement, and was one of the two oldest employees on the police force. *Id.*, No. 11. Mr. Camaione stipulated that his involuntary retirement was effected by the Borough for economic reasons and in accordance with state statutory procedure governing involuntary retirement. *Id.*, Nos. 8, 9, and 10.

Mr. Camaione does not argue that had he received formal notice that his Heart and Lung Benefits were going to be terminated he would have withdrawn these stipulations.² Nor does Mr. Camaione argue that the Borough was required (or even allowed) to consider the effect of retirement upon his benefits. In essence, Mr. Camaione's argument is that the loss of

² In fact, Mr. Camaione entered into these stipulations on May 26, 1985, more than three years after the Borough had stopped paying him monthly Heart and Lung Act benefits. See Joint Stipulations of Fact at 11a.

benefits was somehow "unfair." Due process, however, does not entitle "a person [to] insist on a hearing in order to argue that the decisionmaker [sic] should be lenient and depart from legal requirements." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 n.8 (citing *Dixon v. Love*, 431 U.S. 105, 114 (1977)).

Although Petitioner argues that the decision of the Pennsylvania Supreme Court in this case will be unfair to numerous public servants in the state, this argument is entirely irrelevant to whether this Petition should be granted. The Pennsylvania legislature has conferred certain benefits on police officers, and these benefits do not extend to police officers who are no longer employed by the Borough. There are no Federally guaranteed rights to extended Heart and Lung Act benefits.

Moreover, even if the Borough's decision was unfair—and Respondent vigorously asserts that it was not—this Court should not grant the Petition.

[F]ederal court is not the appropriate forum in which to review the multitude of . . . decisions that are made daily by public agencies. We must accept the harsh fact that numerous . . . mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error.

Bishop v. Wood, 426 U.S. 341, 349-50 (1976) (footnote omitted).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES E. KELLEY, JR.*
GENE E. McDONALD
McDONALD, MOORE, MASON & SNYDER
1005 Courtyard Plaza
P.O. Box 758
Latrobe, Pennsylvania 15650
(412) 539-3511

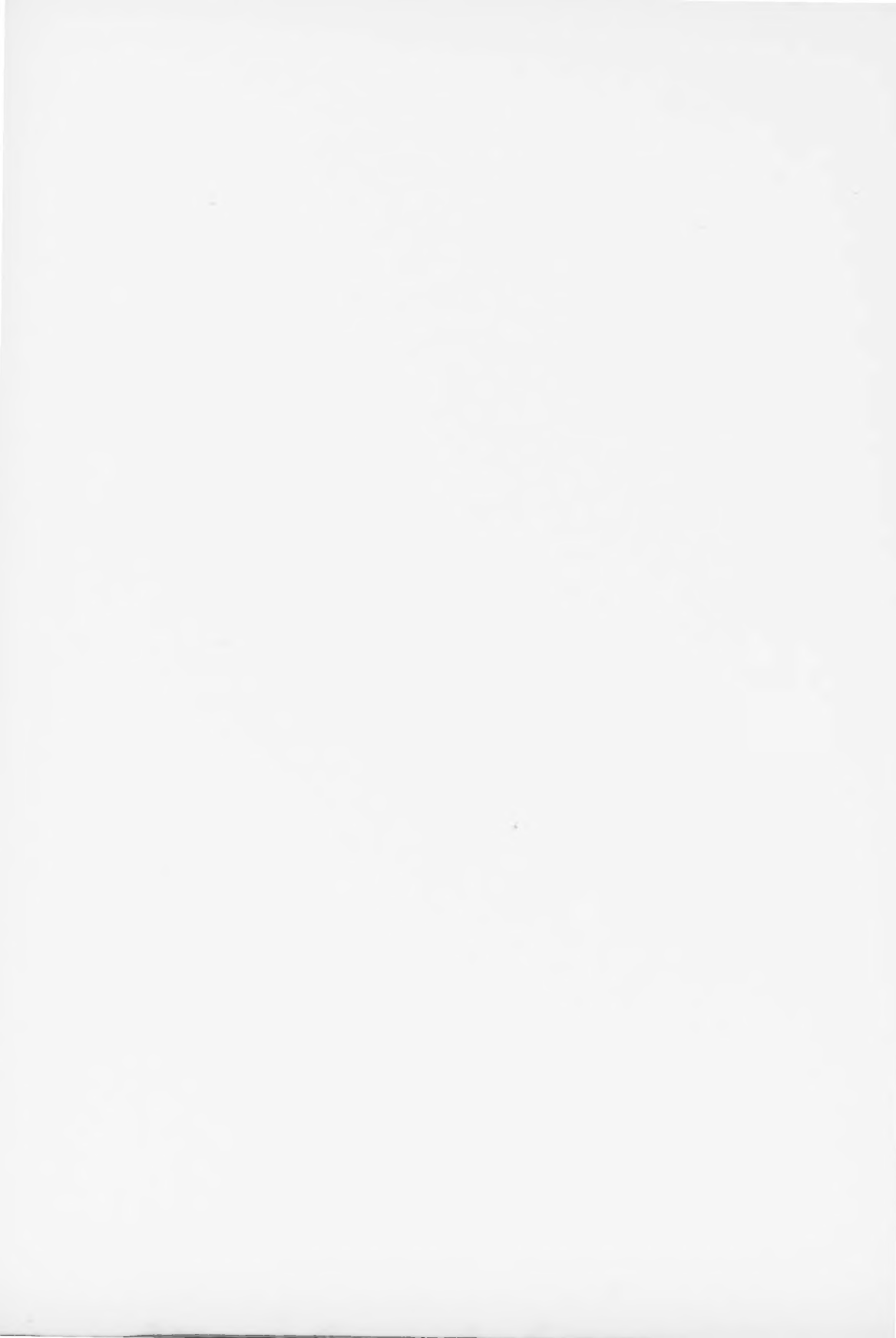
Counsel for Respondent

**Counsel of Record*

Of Counsel:

MARK L. AUSTRIAN
MARCY M. REHBERGER
COLLIER, SHANNON & SCOTT
3050 K Street, N.W.
Washington, D.C. 20007
(202) 342-8400

Dated: September 24, 1990



APPENDIX

APPENDIX A

Supreme Court of Pennsylvania

Argued Sept. 28, 1989.

Decided Dec. 21, 1989.

Reargument Denied Feb. 20, 1990.

JOSEPH CAMAIONE, SR.,

Appellee,

v,

BOROUGH OF LATROBE,

Appellant

James E. Kelley, Jr., McDonald, Moore, Mason & Snyder, Latrobe, for appellant.

Vincent J. Quatrini, Jr., Greensburg, for appellee.

Anthony C. Busillo, II, Harrisburg, for amicus curiae, PA Lodge of the FOP.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

PAPADAKOS, Justice.

This is the appeal of the Borough of Latrobe (Borough) from the opinion and order of the Commonwealth Court reversing an order of the Court of Common Pleas of Westmoreland County and remanding to that court with instructions that benefits under the Heart and Lung Act¹

¹ Act of June 28, 1935, P.L. 477, Section 1, 53 P.S., Section 637, as amended May 31, 1974, P.L. 309, No. 99, Section 1, 53 P.S. Section 637 (Supp. 1981-82).

be restored to Joseph Camaione, Sr. (Appellee), until such time as an evidentiary hearing is conducted to establish whether Appellee's temporary disability has ceased. 113 Pa. Comwlth. 113, 536 A.2d 500.

The facts underlying this matter were stipulated to by the parties and are relatively simple. Appellee, a police officer of the Borough, suffered a work-related injury on February 5, 1975. Appellee could not return to work and began receiving Heart and Lung Act benefits because he was deemed temporarily incapacitated from performing his duties.² Appellee was also awarded worker's compensation benefits which were paid over to the Borough as a form of subrogation in accordance with the provisions of the Heart and Lung Act.

This arrangement continued until July 27, 1981, when the Borough enacted a Resolution, effective as of September 1, 1981, requiring the retirement of the two oldest police officers on the Borough Police Force, one of whom was Appellee. This action was taken pursuant to 53 P.S. Section 46190 which permits Boroughs to retire employees eligible for pensions starting with the oldest employee and following in order of age if economic reasons exist to reduce the size of the police force.

Appellee was notified that the Borough was contemplating this action and that the Resolution was, in fact, enacted. Beginning on September 1, 1981, Appellee's regular salary check issued pursuant to the Heart and Lung Act was terminated and he began receiving the worker's

² The section pertinent to this case is found at 53 P.S. Section 637 and provides as follows:

Any policeman . . . of any Borough . . . who is injured in the performance of his duties . . . and by reason thereof is temporarily incapacitated from performing his duties, shall be paid by the . . . municipality, by which he is employed, his full rate of salary, as fixed by Ordinance or Resolution, until the disability arising therefrom has ceased.

compensation check directly as well as a pension check which together totalled more than the salary he had been receiving pursuant to the Heart and Lung Act.

In January, 1983, however, a referee for the Worker's Compensation Board reviewed Appellee's disability claim and, following a hearing, determined that Appellee's condition was no longer total and that an adjustment to his weekly benefits would have to be made. Because the partial disability would exist for over 500 weeks, the referee determined that a lump sum payment of \$25,000.00 was in order and, accordingly, awarded this amount to Appellee which he accepted on February 22, 1983.

As a result of this action, Appellee's worker's compensation check was terminated and he continued to receive his pension check only. He now was receiving each month less than his salary had been. This situation continued for fifteen months when, on May 22, 1984, Appellee filed a complaint in Mandamus seeking to have the Borough restore his full salary under the provisions of the Heart and Lung Act. Appellee reasoned that he was entitled to his full salary as long as his disability was of a temporary nature and that he was never afforded a hearing to establish that a change in his condition had occurred. The trial court denied relief, but the Commonwealth Court reversed holding that Appellee was entitled to notice that his involuntary retirement would affect his rights under the Heart and Lung Act.

In so holding, the Commonwealth Court relied on our decision in *Callahan v. Pennsylvania State Police*, 494 Pa. 461, 431 A.2d 946 (1981), for the proposition that a police officer's status under the Heart and Lung Act could not be changed from temporary disability to permanent disability without a due process hearing. We accepted the Borough's petition for allowance of appeal to examine whether *Callahan* was properly applied in the situation where a Borough exercises its legislative prerogative under the

Borough Code to control the size of its police force because of economic reasons.

When we have had occasion to review the provisions of the Heart and Lung Act, we have emphasized that this remedial legislation provides compensation for police who suffer temporary incapacity or disability in the performance of their work. The guarantee of uninterrupted income during periods of temporary disability has been cited as an attraction for service in the police force and one that assures a reasonably speedy return to full active duty. *Kurtz v. Erie*, 389 Pa. 557, 133 A.2d 172 (1957). Compensation for total disability is not permitted under the statute and has not been allowed by this Court. *Kurtz; Creighan v. City of Pittsburgh*, 389 Pa. 569, 132 A.2d 867 (1957).

In addition, once it is determined that a policeman qualifies for benefits under the Heart and Lung Act, his disability status cannot be changed from temporary to permanent unless a due process hearing is afforded. *Cunningham v. Pennsylvania State Police*, 510 Pa. 74, 507 A.2d 40 (1986); *Callahan v. Pennsylvania State Police*, 494 Pa. 461, 431 A.2d 946 (1981).

We have also indicated, however, that the benefits of full compensation granted by the Act can be terminated through voluntary retirement and the Commonwealth Court and the Superior Court have both applied the statute in this manner. See, *Creighan v. City of Pittsburgh*, 389 Pa. 569, 132 A.2d 867 (1957); See also, *Hasinecz v. Pennsylvania State Police*, 100 Pa. Commonwealth Ct. 622, 515 A.2d 351 (1986) (Court indicated that benefits of act do not extend to former members of police force); and *White v. West Norriton Township*, 158 Pa. Superior Ct. 375, 45 A.2d 401 (1946) (Court held that dismissed police officer could not invoke benefits of the act.)

The other statute that comes into play in this case is the Borough Code which authorizes a borough to reduce

its police force for reasons of economy.³ This section vests authority in the Borough, as the body responsible for fiscal matters to control the size of its police and fire departments by implementing cuts when reasons of economy come into play.

We have held that an officer who is retired under this section is not entitled to a hearing before the Civil Service Commission since there are no charges motivating the retirement. *Kusza v. Maximonis*, 363 Pa. 479, 70 A.2d 329 (1950). We have also affirmed the authority of a municipality to enact mandatory retirement legislation as a necessary detail of municipal administration and no appeal lies from such action. *In re Wallington's Appeal*, 390 Pa. 416, 135 A.2d 744 (1957). These cases stand for the proposition that municipalities must have the power to control the orderly and proper functioning of their retirement funds and to react in a responsible manner to economic developments because they and they alone are required to raise tax revenues to fund the programs which are determined to be necessary.

The question here presented is whether Appellee's involuntary retirement can be accomplished under this section without a hearing, and if so, whether this retirement can have an effect on his benefits under the Heart and Lung Act. As we have already recited, the Heart and Lung Act provides for continuing compensation during tempo-

³ 53 P.S. Section 46190 provides in pertinent part:

If for reasons of economy or other reasons it shall be deemed necessary by any borough to reduce the number of paid employees of the police or fire force, then such borough shall apply the following procedure: (i) if there are any employes [sic] eligible for retirement under the terms of any retirement or pension law . . . then such reduction in numbers shall be made by retirement of such employes [sic], starting with the oldest employe [sic] and following in order of age respectively.

rary disability for current members of the police force and the Borough Code provides for a non-reviewable involuntary retirement for economic reasons.

The Borough argues that since Appellee does not question that an economic hardship existed when he was retired and that he had the requisite seniority to be retired, he could be retired under Section 46190 without notice and with no right of appeal. The Borough also argues that the Heart and Lung Act benefits do not confer a property right which supercedes the Borough's right to regulate its police complement because of economic hardship. We agree.

The benefits conferred by the Heart and Lung Act do not guarantee lifetime employment. We have carefully reviewed the Heart and Lung Act and conclude that its provisions do no more than assure uninterrupted compensation of salary for current members of a police force while a temporary incapacity exists to insure that injured police officers are treated equally with actively employed officers.

There is no indication that this Act confers any rights upon injured officers as to the terms of their employment or that the Act in any way removes the right to hire, fire, furlough or retire which is vested in the Borough under Section 46190. All that the Heart and Lung Act provides is that while an officer is a member of the police force his temporary incapacity status cannot be changed without a due process hearing. This is what *Callahan* stands for and we will not read it or the Act any broader, for to do so would grant greater rights to injured officers than to actively employed officers.

Since the Borough has the sole right under Section 46190 to regulate the size and membership of its police force because of economic constraints, it had the right to invoke this section and retire Appellee. That being the case, his retirement removed him from the group of employees covered by the Act. Since Appellee did not have a right to continued membership in the police force different than

any other police officer employed by the Borough, there was no property right affected by his retirement. Accordingly, there was no adjudication which deprived him of a right for which a hearing was required. *In re Wallington*, 390 Pa. 416, 135 A.2d 744 (1957); *Kusza v. Maximonis*, 363 Pa. 479, 70 A.2d 329 (1950).

The Order of the Commonwealth Court is reversed and the Order of the Court of Common Pleas is reinstated.

LARSEN, J., files a concurring opinion.

LARSEN, Justice, concurring.

I join the majority opinion, especially in light of the fact that appellant, the Borough of Latrobe, and appellee, Joseph Camaione, Sr., entered into a stipulation that appellee was retired "[f]or reasons of economy, and the necessity to reduce projected expenditures in order to balance the budget for the fiscal year ending December 31, 1981, . . ."

APPENDIX B

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

—
No. 3473 of 1984
IN MANDAMUS
—

JOSEPH CAMAIONE, SR.,

Plaintiff

vs.

BOROUGH OF LATROBE,

Defendant

JOINT STIPULATIONS OF FACT

AND NOW comes the Plaintiff, Joseph Camaione, Sr., by and through his attorneys, Vincent J. Quatrini, Jr., Esquire and Morrison F. Lewis, Jr., Esquire, and the Defendant, The Borough of Latrobe, by and through its attorneys, Lightcap, McDonald, Moore & Mason and file the following joint stipulations of fact in the above captioned matter, stipulating as follows:

1. The Plaintiff is Joseph Camaione, Sr., whose date of birth is July 3, 1926, an individual, whose residence and mailing address is R.D. #2, Box 2260, Latrobe, Westmoreland County, Pennsylvania 15650.

2. The Defendant is the Borough of Latrobe, a municipal corporation, incorporated under the laws of the Commonwealth of Pennsylvania, with its principal business office situate at 901 Jefferson Street, Latrobe, Westmoreland County, Pennsylvania 15650.

3. Plaintiff was employed by Defendant as a police officer from the 1st day of December, 1950 to September 1, 1981.

4. On February 5, 1975, Plaintiff suffered a work-related injury which resulted in Plaintiff becoming temporarily totally disabled.

5. From the date of Plaintiff's injury until the 12th day of January, 1983, Plaintiff received his proper entitlement under the Worker's Compensation Act in the amount of \$136.31 per week.

6. By Order of Floyd R. Warren, Worker's Compensation Referee, dated January 12, 1983, the Referee found that on January 10, 1983, plaintiff's disability changed from total disability to partial disability which entitled Plaintiff to Worker's Compensation at the weekly rate of \$63.00.

7. By the same Order, the Referee also found that Plaintiff's disability would continue for a period of 500 weeks and commuted his entitlement to a lump sum amount of \$25,000.00, which amount was paid to Plaintiff on or about February 22, 1983.

8. For reasons of economy, and the necessity to reduce projected expenditures in order to balance the budget for the fiscal year ending December 31, 1981, the Borough of Latrobe found it necessary to reduce the number of paid employees of the Latrobe Borough Police Department by two members.

9. In order to comply with Section 1190 of the Borough Code of the Commonwealth of Pennsylvania, subsection (i) providing for retirement of eligible employees beginning with the oldest employee and following in order of age respectively, the Borough of Latrobe passed a Resolution on July 27, 1981 retiring from the police force Plaintiff, Joseph Camaione, Sr., and one other police officer.

10. The Defendant, Borough of Latrobe, followed all proper statutory procedures in effectuating retirement of the Plaintiff.

11. At the time of the enactment of the Resolution for retirement, Plaintiff, Joseph Camaione, Sr., was 55 years old and was one of the two oldest employees on the Latrobe Borough police force eligible for retirement.

12. Plaintiff did not, by formal action, contest or object to his retirement, nor the procedure by which he was retired by Defendant, either at the time of his retirement or at any time subsequent thereto. However, Plaintiff did object to the retirement by refusing to sign a retirement form and by verbally conveying his protest to the Borough Administrator and to the Insurance Carrier for the retirement fund.

13. Plaintiff was notified orally of his retirement after the date of enactment of the retirement resolution and was personally served with a notice of his retirement describing the retirement resolution on July 31, 1981 by a police officer of the Borough of Latrobe.

14. Plaintiff's retirement became effective on September 1, 1981.

15. From the date of Plaintiff's injury until September 1, 1981, Plaintiff was paid by the Defendant his full rate of salary, as fixed by Ordinance or Resolution, pursuant to the provisions of 53 Purdon's Statute, Section 637. Defendant issued a bi-weekly check to the Plaintiff for said payment which was Plaintiff's usual and customary method of receiving his salary.

16. From and after September 1, 1981 and continuing to the present, Plaintiff has received from the Retirement Fund Administrator, and continues to receive, his monthly pension benefit check in the amount of \$684.12, pursuant to the provisions of Borough of Latrobe Pension Plan, Contract No. GA 6684.

17. The only compensation claim by Plaintiff at issue in the within matter is that amount alleged to be due and owing from September 1, 1981 to the present.

18. Plaintiff's net monthly income, after deduction of all proper withholdings for the years 1981 through 1985 is as follows:

1981 - \$1,052.13 per month.
 1982 - \$1,197.23 per month.
 1983 - \$1,244.88 per month.
 1984 - \$1,282.86 per month.
 1985 - \$1,326.62 per month.

19. Plaintiff's monthly retirement benefit check, commencing September 1, 1981 to the present is \$684.12.

20. Plaintiff's monthly Worker's Compensation benefit for the calendar years 1981 through 1985 is as follows:

September 1, 1981 to December 31, 1982 - \$590.67 per month.

January 1, 1983 to present - \$273.00 per month.

Plaintiff filed the within action in mandamus on May 22, 1984.

Respectfully submitted,

LIGHTCAP, McDONALD, MOORE
 & MASON

By: _____
 Gene E. McDonald, Esquire

By: _____
 James E. Kelley, Jr., Esquire
 Attorneys for Defendant

By: _____
 Vincent J. Quatrini, Jr., Esquire
 Attorney for Plaintiff

[Filed May 26, 1985]